

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

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|------------------------------|---|------------------------------------|
| TIMOTHY LINDSEY BEARRY, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Case Number: 2:14-cv-00496-AKK-JHE |
| |) | |
| WARDEN KENNETH JONES and THE |) | |
| ATTORNEY GENERAL FOR THE |) | |
| STATE OF ALABAMA, |) | |
| |) | |
| Respondents. | | |

MEMORANDUM OPINION

On July 28, 2014, the magistrate judge entered a Report and Recommendation, (doc. 9), recommending that the petition for writ of habeas corpus be dismissed with prejudice. The petitioner has filed objections. (Doc. 10). To the extent the petitioner objects to the magistrate judge's report and recommendation on the grounds (1) he could not file a timely habeas petition because he was in a mental health facility and suffers from a mental disability, (*id.* at 1), and (2) he is actually innocent, (*id.* at 2), neither equitably toll or excuse his failure to file this petition within the statute of limitations. First, assuming the petitioner could not diligently pursue his rights due to an alleged mental disability from sometime between July 1998 (when he wrote the court clerk requesting copies of his case file), (doc. 1-1 at 8), and 2003 (when he decided to research his case), (*id.* at 8-9), the petitioner offers no excuse for waiting until August 21, 2007 to file his Rule 32 petition. This delay of four years between when he admittedly began investigating his case and filing a Rule 32 petition exceeds the statute of limitations. 28 U.S.C. § 2244. Additionally, while actual innocence can overcome the statute of limitations, *McQuiggins v. Perkins*, – U.S.–, 133 S. Ct. 1924 (2013), the petitioner raises this for the first time in his objections and clearly does not make the threshold

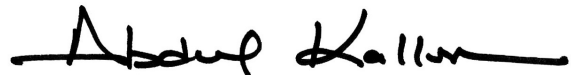
showing “that, in light of new evidence, no juror, acting reasonably, would have voted to find his guilty beyond a reasonable doubt.” *Schulp v. Delo*, 512 U.S. 298, 329 (1995).

The court has considered the entire file in this action, together with the report and recommendation, and has reached an independent conclusion that the report and recommendation is due to be adopted and approved.

Accordingly, the court hereby adopts and approves the findings and recommendation of the magistrate judge as the findings and conclusions of this court. The petition for writ of habeas corpus is due to be DISMISSED. A separate Order will be entered.

This Court may issue a certificate of appealability “only if the applicant has a made a substantial showing of the denial of a constitutional right.” 28 U.S.C. 2253(c)(2). To make such a showing, a “petitioner must demonstrate that reasonable jurist would find the district court’s assessment of the constitutional claims debatable and wrong,” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that “the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted). This Court finds Petitioner’s claims do not satisfy either standard.

DONE this 14th day of August, 2014.

A handwritten signature in black ink, appearing to read 'Abdul Kallon', written over a horizontal line.

ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE